
(1987) 06 MAD CK 0004
In the Madras High Court
Case No : Writ Petition 438 of 1981

T.K. Diamond Chain Ltd., Ambattur, Madras-53	APPELLANT
Vs	
The Regional Director, Regional Office (Tamil Nadu) Employees' State Insurance Corporation, Madras-34	RESPONDENT

Date of Decision : 19-06-1987

Acts Referred:

Employees State Insurance Act, 1948 — Section 85B

Citation : (1987) 06 MAD CK 0004

Hon'ble Judges : Nainar Sundaram, J

Bench : Single Bench

Advocate : Mr. N. Balasubramanian, for the Appellant; Mr. S.M. Ali Mohamed, for the Respondent

Judgement

Nainar Sundaram, J.—This writ petition is directed against the order of the respondent under S. 85B of the Employees' State Insurance Act

34 of 1948, hereinafter referred to as "the Act", imposing on the petitioner a damage of Rs. 45,374/- for delayed payment of contribution under

this Act. Mr. N. Balasubramanian, learned counsel for the petitioner would submit that the respondent while passing the impugned order, has either

committed to consider and adjudicate upon the reasons given by the petitioner or brushed aside the same on perverse and totally untenable

grounds. It is a well settled proposition that the proceedings of the present nature are quasi judicial and a decision under S. 85B of the Act must be

rendered in a judicious manner and there ought to be proper advertence to and adjudication upon the contentions or the explanations offered by

the party to be affected by the ultimate order. There ought to be a proper application of mind on the part of the authority to the points raised by the

party to be affected. That there was such an application of mind must stand reflected in the ultimate order. The points raised by the party should

have been the subject matter of judicious consideration. The explanation offered by the party for what ever it is worth cannot be glossed over and

on the other hand, it has got to be the subject matter of judicious assessment. A Bench of the High Court of Karnataka in E.S.I. Corporation v.

Thungabadra Steel Products Ltd. 1980 57 F.J.R. 76, analysed and assessed the import and mandate of S. 85B of the Act in the following terms:-

Thus analysing the section, it is clear that before invoking the provisions of S. 85B of the Act, there must be (i) default in the payment of

contribution on the part of the employer, (ii) damages liable to be recovered shall not exceed the amount of arrears and (iii) in each case only such

damages shall be fixed as appear proper and fit for imposition.

Before levying any damages by way of punishment, the Employees' State Insurance Corporation shall give a reasonable opportunity to the

employer of being heard.

These ingredients would clearly establish that the proceeding is a quasi judicial-proceeding and the Employees' State Insurance Corporation

should follow the principles of natural justice in imposing the penalty. It means that the employer should be given an opportunity to show cause for

the default and against the levy of penalty. It further means that the said Corporation shall consider in a judicious manner the explanation offered by

the employer, if any, to find out whether it provides for a reasonable excuse for the delay or the default. Further, the Corporation must consider the

gravity of the situation in each case and shall levy the damages as found proper and fit on the facts of the case. The desert shall be just and not

excessive. It is needless to point out that the authorised officer of the Corporation shall pass a speaking order giving reasons for the levy of

damages and for accepting or not accepting the explanation offered by the employer.

2. In E.S.I. Corporation v. Meecos Ltd. 1980 K.L.T. 179, a Bench of the High Court of Kerala summed up the position as follows:

The imposition of damages is a matter of judicial exercise. To put it in other words that damages is not related to actual loss does not mean that it

could be arbitrarily imposed. If it be a compensation for loss the question, such a

question for the defaulter may be able to show for non-compliance, may be not relevant. But where damages does not actually depend on the loss suffered by the defaulting party and it is in the nature of a deterrent imposed to enable proper enforcement made of the Act, the circumstances of the default will have relevance. The justification that a party may be able to urge for failure to pay may have to be taken into account in determining the quantum, To lay down any rule as to determination of quantum would be to add to the provisions of the Act and to circumscribe or limit the discretion of the Corporation in determining the quantum of damages. We need only indicate here that being in the nature of penalty the considerations that may weigh in the determination of the quantum will be different from the considerations that may weigh in the determination of the quantum of damages in the event of a breach of contract or the tortious conduct of a person.

3. In *M/s Toshiba Anand v. E.S.I. Corporation* 1980 Lab. 1.C. 907, the very same Bench of the High Court of Kerala, which decided the case in

E.S.I. Corporation v. Meecos Ltd. 1980 K.L.T. 179 observed as follows with regard to the determination of charges under S. 85B of the Act:

The determination of quantum of damages is not to be a subjective determination. There must be an objective approach taking into account all the matters which are relevant thereto. Such objective exercise must be reflected in the order. It must be possible to understand from the order the reasons for determining the quantum at the figure mentioned in the order. That is evidently not possible in this case. It is not possible to lay down any hard and fast rules as to what are the matters that would have relevance in fixing the quantum of damages under S. 85B. To lay down any formula in regard to such quantum would be to trespass upon the powers of the Corporation which is to make its independent exercise in determining the quantum under S. 85B. Even so it would be of benefit to state here that the quantum must necessarily be related to the gravity of the Penal element in the default on the part of a party. That in turn must depend upon the validity of the explanation the party may give for default.

Other matters which may have relevance in determining how far the party has been indifferent or callous in meeting the obligations under the Act

may also call for consideration. If a party is able to satisfy the Regional Director

that though default has been committed by him it was due to circumstances beyond his control or that despite his best efforts he could not make the contributions in time that would certainly be a mitigating circumstance which would serve to soften the rigour of the penalty that may be imposed under the Section.

In the instant case, one of the reasons advanced by the petitioner for the delay was that there was a bona fide impression entertained that the

contribution should be paid within twenty one days from the date of payment of wages to the employees. This reason has neither been accepted

nor rejected by the respondent in the impugned order by giving any reasons therefore. There is a possibility that on an over all assessment of the

facts of the case, this reason may be accepted as a relevant one to show that the petitioner had not been indifferent or callous in meeting the

obligations under the Act. Yet another reason advanced by the petitioner for the delay was non-availability of (sic)stationery form at the local

office. The respondent adverts to this reason, but would say that the stationery forms could have been secured from the Regional Office. If the

petitioner should normally secure the stationery forms from the local office only, should the failure on the part of the petitioner to obtain the forms

when not available in the local office, from the Regional Office be viewed with strict rigour is a question not properly adverted to and answered by

the respondent. It could be argued that this was a bona fide circumstance beyond the control of the petitioner. I am not expressing any final opinion

on any of these features since I am remitting the matter back to the respondent for fresh consideration and I am only touching upon these features

to show that there has been lack of proper application of mind on the part of the respondent. It must be remembered that the proceedings are

deterrent and penal in nature and every reason offered for delay as stated above, must be adverted to and adjudicated upon in a proper and

judicious manner. This has not been done with regard to the reasons advanced by the petitioner. It is true that the respondent has considered

certain other factors and has chosen to reduce the damages earlier notified in the show cause by 50% for some periods. But as to how far the

petitioner should stand exonerated even with regard to the imposition of 50% damages if the above explanations are considered and adjudicated

upon in a judicious manner, this Court need not dwell upon, at this juncture. In my view, there has not been a proper exercise of mind on the part of the respondent in respect of the explanations offered by the petitioner for the delay and this features obliges me to interfere in writ powers setting aside the order passed by the respondent and remitting the matter to him for fresh consideration. The respondent shall consider all the points and explanations offered by the petitioner and adjudicate upon them in a judicious manner. The respondent shall also afford sufficient opportunity to the petitioner to substantiate its case on the points and explanations offered by it. The respondent need not necessarily confine the fresh enquiry only to the points discussed above but shall reassess all the points raised by the petitioner so as to result in a comprehensive decision of the matter even though I have here discussed only some of the infirmities in the order of respondent pointed out before me. This writ petition is allowed in the above terms. No costs.